United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

No. 76-4077

United States Court of Appeals

FOR THE SECOND CIRCUIT

STOLL INDUSTRIES, INC.,

and

MELANGE SPORTSWEAR, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's findings that petitioners interfered with, restrained and coerced their employees, in violation of Section 8(a)(1) of the Act.

2. Whether substantial evidence on the record as a whole supports the Board's finding that petitioners violated Section 8(a)(3) and (1) of the Act by discharging employee Nelson Arroyo because of his support for Local 155 and opposition to Local 318.

COUNTERSTATEMENT OF THE CASE

This case is before this Court upon the petition of Stoll Industries, Inc., and Melange Sportswear, Inc. (hereafter "Stoll", "Melange", and collectively "petitioners"), for review of an order (A. 20-23)[1] of the National Labor Relations Board issued on March 15, 1976, and reported at 223 NLRB No. 11. The Board has filed a cross-application for enforcement of its order. This Court has jurisdiction under Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), the unfair labor practices having occurred in Brooklyn, New York.

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that petitioners took coercive and discriminatory action to thwart their employees' organizational interest in Knitgood Workers Union Local 155, International Ladies' Garment Workers' Union, AFL-CIO ("Local 155"), and to encourage their support for Local 318, International Brotherhood of Pulp, Sulphite and Paper Mill Workers, AFL-CIO ("Local 318"). Thus, the Board found that petitioners violated Section 8(a)(1) of the Act by soliciting employees to join Local 318 and offering to pay its initiation fees and dues; coercively interrogating employees concerning their interest in Local 155; warning employees not to join Local 155 and indicating that petitioners would not recognize it; and

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[1] "A." refers to the portions of the record printed as an appendix to the parties' briefs; occasional "Tr." references are to portions of the trial transcript, a copy of which has been lodged with the Court. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "S.A." references are to the supplemental appendix, *infra*.

threatening employees with discharge or a shut-down if they became or remained members of Local 155. The Board also found that petitioners discharged employee Nelson Arroyo because of his support for Local 155 and opposition to Local 318, in violation of Section 8(a)(3) and (1) of the Act.[2] The evidence underlying these findings is set forth below.

A. Background

Petitioners are New York corporations engaged in the design, manufacture and sale at wholesale of ladies' garments (A. 4; 26-28, 38-39, 41-42, 45). Melange designs and sells blouses and sweaters (A. 5; 27, 38-39, 45, 284); Stoll is a contractor which provides over 50% of the sewing and cutting services for Melange (A. 5; 26, 41-42, 45, 273-274, 448). Petitioners began operations in September 1974 at a Brooklyn plant (A. 6; 26-28, 38-39, 41-42, 45). Stoll occupies the sixth floor of the plant and provides space in its premises for Melange's shipping and receiving operations (A. 6; 274, 683).[3] Melange's designers and salesmen work at its

[2] The complaint originally charged (paras. 10-13, 23), in addition, that petitioners violated Section 8(a)(2) of the Act by recognizing Local 318 as bargaining representative of the employees and entering into collective bargaining contracts with it notwithstanding the fact that Local 318 never represented an uncoerced majority of the employees (A. 29-32, 35-36). These allegations were subsequently deleted upon petitioners' agreement, with Local 318's concurrence, to withdraw recognition of Local 318 as bargaining representative of the employees, to set aside the collective bargaining contracts with Local 318 and to hold a consent election to determine a proper bargaining representative (A. 4, n. 2; 105-111). We are advised by the General Counsel's Regional Office in Brooklyn that, following a consent election which was set aside, a rerun election was held in which Local 318 was elected to represent petitioners' employees.

[3] Garments manufactured for Melange by Stoll are sent directly to the customers of Melange from Melange's shipping and receiving department; garments manufactured for Melange by other contractors are sent to Melange's shipping and receiving department, and then boxed and shipped from the Stoll premises to Melange customers (A. 8; 281-282, 286).

Manhattan showroom (A. 6, n. 3; 373, 27, 38-39, 41-42, 45); its packing, shipping and receiving employees and its bookkeepers (who maintain the records for both Melange and Stoll) work at the Stoll premises (A. 6; 417-419, 27, 38-39, 41-42, 45). During the relevant period, Stoll had an average of 50 employees, and Melange an average of 22 employees (A. 6; 446-447).

Melange's Secretary-Treasurer and Production Supervisor is Peter Rossi; Rossi is in charge of not only Melange's employees but also Stoll's cutters and sewing machine operators and their respective foremen, Herman Guzman and Carmelo Callari (both on the Stoll payroll) (A. 6; 269-270, 280-281, 284, Tr. 684-685, 69, 80, 85, 212, 223, 231, 246). Rossi spends most of his working day on the Stoll premises (A. 6-7; 273, 319-320, Tr. 69, 212, 230, 246). Acting under authority from Stoll's President Stanley Yagoda (A. 6; Tr. 684), Rossi continually checks the work of Stoll employees and, when work has to be corrected or accelerated, gives orders to the foremen or directly to the cutters and operators (A. 6-7; 269-270, 284-285, 293, Tr. 684-685, 69, 212, 224, 231, 246). Rossi has disciplined (A. 7; 255-258, 259-261, Tr. 259-260), hired (A. 6, 8, n. 6; 306-307, 313-314, Tr. 685-688, 68, 244-246) and discharged (A. 7; 92, 159-160, 212, Tr. 70, 75-80, 83, 246-248) Stoll employees. While Stoll's President Yagoda has exercised supervisory authority over petitioners' employees, including those on the Melange payroll (A. 10, n. 9; 80, Tr. 683-685), Stoll employees recognize Rossi rather than Yagoda as their "boss" since Yagoda spends his working day in his office, having entrusted the direct management of the employees to Rossi (A. 7-8, 10, n. 9; 261, Tr. 684-687, 81, 212, 218, 231, 235).

Immediately under Production Supervisor Rossi on the Melange side of the shop is Office Manager Carmine Minichino (A. 8; 395, 418, 275), who supervises Stoll and Melange employees and oversees the bookkeeping for both companies (A. 6, 8; 395, 409, 416-419, 102-104, 131, 135-136, 141, 452). Under Minichino is Traffic Manager Norris Orie, who is in charge of the shipping and receiving department (A. 8; 371-373, 380-381, 417, 419, 79-80, 103).

Rossi, Minichino, Orie, Yagoda, Callari and Guzman were found to be supervisors under Section 2(11) of the Act (A. 8-10). In light of the interrelated and united operations of Melange and Stoll, their centralized control of labor relations and their common management under Rossi and Minichino, petitioners were found to be joint employers for purposes of the Act (A. 8).[4] Petitioners have not contested the supervisory or "joint employer" findings in their exceptions to the Board or in their brief to this Court.

B. Local 155 Begins its Organizing Activity

Before working as production supervisor for petitioners, Peter Rossi was the president and principal participant of Harborview, a Brooklyn sewing company which had a collective bargaining contract with Local 155 (A. 10; Tr. 37-40, 54). After Harborview terminated operations in May or June 1974, petitioners hired many of its employees to work at the Brooklyn plant and imported a number of its sewing machines (A.

[4] See *Radio Union v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *N.L.R.B. v. Local 810, Teamsters*, 460 F.2d 1 (C.A. 2, 1972), cert. denied, 409 U.S. 1041.

10; Tr. 38, 40, 42, 44, 46, 244). In August 1974, Norman Lewis, Local 155's director of organizing, sought out Rossi at petitioners' plant and expressed the view that the contract between Harborview and Local 155 was still in existence (A. 10-11; Tr. 36-38). Lewis accused Rossi of setting up the Stoll-Melange operation as a "runaway" from that contract (A. 10-11; Tr. 36-38). Rossi replied that he wanted no dealings with Local 155 (A. 11; Tr. 37, 51, 55).

In December 1974 Local 155 organizer Lewis visited the Stoll plant and, while outside the building, gave Local 155 organizing cards to several employees, including Nelson Arroyo and Ramonita Guzman, for distribution to their fellow workers (A. 11; 86-87, Tr. 38-39, 50-51, 70-71, 86-87). Arroyo and Guzman signed cards themselves and distributed others (A. 11; 86-87, Tr. 71, 86-87). A number of employees began returning signed cards to Lewis in mid-December 1974 (A. 11; 87, Tr. 52-53).

Shortly after January 1, 1975, Stoll's President Yagoda saw Union Organizer Quinonas distributing leaflets for Local 155 (A. 11; 470, Tr. 688-689, 712-713). Quinonas gave Yagoda a leaflet, at Yagoda's request, and a business card as well (A. 11; 470, Tr. 688-689, 712-713). Yagoda told Quinonas and a co-organizer that they were trespassing and that petitioners already had a union, Local 318 (A. 11; Tr. 712-713).

C. Petitioners Respond to Local 155's Organizing Activity with Unlawful Interference, Restraint and Coercion

In response to Local 155's organizing activities (A. 11; Tr. 37, 712-713), petitioners began soliciting card signatures for Local 318. On January 8, 1975, Callari (Stoll's foreman of the sewing machine department)

handed cards for Local 318 to employees under his supervision and told them to sign (A. 11; Tr. 212-213, 232, 238). Some employees did sign cards and returned them to Callari (A. 11; Tr. 216, 232). Orie (Melange's foreman in charge of packing and shipping) also successfully urged an employee in his department to sign a card for Local 318 (A. 11; 81).

At about noon on January 8, 1975, Production Supervisor Rossi called a plant meeting of Stoll and Melange employees (A. 12; Tr. 213, 248-249, 72). Rossi told the employees that the factory was contractually bound to Local 318, that Local 318 offered good benefits, and that he would pay for fees and dues for that union (A. 12; Tr. 213, 250). He further stated that those who refused to join Local 318 would he discharged (A. 12; Tr. 213, 250). Rossi then gave Foreman Callari Local 318 cards, which Callari distributed to the employees (A. 12; Tr. 213, 250). Employee Rosanna Narvaez asked if she had to sign immediately; Callari said yes and she complied (A. 12; Tr. 250-251).

On January 14, 1975, Foreman Callari gave employee Ramonita Guzman, while at work, a Local 318 card to sign (A. 13; Tr. 73-74, 81). She said she would read it (A. 13; Tr. 73). Callari contacted Production Supervisor Rossi; shortly thereafter, Stoll's President Yagoda brought Guzman to his office and asked her why she would not sign a Local 318 card (A. 13; Tr. 73-74, 81-82, 102). Guzman said she had to read it first (A. 13; Tr. 74, 102). Yagoda asked if she had signed a card for Local 155; Guzman replied, falsely, that she had not (A. 13; Tr. 107-108, 110). Yagoda also told Guzman that if she refused to sign a Local 318 card it was "bye, bye" – a message that Yagoda underscored by waving his hand in a gesture of farewell (A. 13; Tr. 74, 101-102). The

next day Guzman gave Callari a signed card for Local 318 (A. 13; Tr. 74, 102).

On January 16, 1975, Production Supervisor Rossi called and conducted a second plant meeting of all Stoll and Melange employees (A. 12; Tr. 72, 84, 216, 233). Rossi told the employees that Local 318 was their union (A. 12; Tr. 72, 216-217, 233); that he did not know why they were signing cards for Local 155 (A. 12; Tr. 216-217); that they could not be represented by two unions (A. 12; Tr. 216-217); and that anyone who joined a union other than Local 318 would be discharged (A. 12; Tr. 72-73, 216-217, 233). He offered again to pay the dues and fees for Local 318 (A. 12; Tr. 73, 233) and stated that the consequence of their choosing Local 155 would be a factory shut-down (A. 12; Tr. 73).

In mid-January 1975 (at about the same time as the second plant meeting), Melange's Foreman Orie asked Nelson Arroyo and one Vargas, employees in the packing and shipping department, to sign cards for Local 318 (A. 11; 87-89, 238-239, 373). Arroyo and Vargas refused (A. 11; 88, 239-240). Orie insisted that they sign, but they still refused (A. 11; 88). Orie then called in Rossi and told him that Arroyo and Vargas were refusing to sign (A. 11; 88, 239-240). After ascertaining from Arroyo and Vargas themselves (A. 88, 239-240) that Orie's assessment was correct, Rossi took the two employees to an office and asked them, this time in the presence of Stoll's President Yagoda, why they would not sign up for Local 318 (A. 11; 88-89, 240). When Arroyo and Vargas expressed a negative attitude about Local 318 (A. 11; 240), Rossi asserted that unless they signed they would have to look for work elsewhere (A. 11-12; 89, 240-241, 193). Yagoda reiterated Rossi's warning and added that

Local 318 was a good union and that he would pay for the employees' initiation fees and dues (A. 12; 89, 192, 196). At that point Arroyo and Vargas both signed (A. 12; 89, 241).

On about January 24, there was a third plant meeting (A. 13; 89-90, Tr. 100-101, 222-223). Among those present were Yagoda, Rossi and one Olivieri, a representative of Local 318. After announcing that petitioners had signed a contract with Local 318, Olivieri described various benefits of that contract (A. 13; 89-91, Tr. 100, 222-223).

D. Petitioners Discharge Employee Arroyo Because of his Active Support for Local 155 and Opposition to Local 318

Arroyo began working for petitioners in October 1974, when he was hired by Foreman Orie to work for $2.60 per hour (on the Melange payroll) in the packing and shipping department (A. 13; 46, 84, 94, 372-373). Arroyo had previously been in charge of the shipping department at another Brooklyn plant (A. 13; 111-112, 218, 372-373).

In December 1974, after Christmas, Arroyo and Vargas, also a packer, were temporarily laid off because of a seasonal slowdown in business (A. 15; 102, 136, 145, 172-173, 213, 244, 445-447, 449-450, 452). Office Manager Minichino told Arroyo to call in daily to find out if he was needed for work (A. 15; 102, 130-136, 141-145, 452); Orie gave Vargas the same instructions (A. 15; 449-450, 136). Both men complied (A. 15; 102, 130-136, 450, 452, 262, 56-58) and, after a short period, were called back to work – Arroyo on January 13, 1975, and Vargas about a week earlier (A. 15; 59, 102, 130-136, 231-232, 447, 449-450, 452). When

Arroyo was recalled on January 13, Minichino granted, and Orie approved, a pay raise for him from $2.60 to $3.00 per hour (A. 13-14, 15; 84-86, 216, 230, 380-381, 407, 409). During his first few days on recall, Arroyo was assigned to the special job of opening returned boxes of merchandise that had been accumulating (A. 15; 103, 449, 452). After cleaning up this backlog, Arroyo's job was to work on returns in the morning and to pack new merchandise for shipment in the afternoon (A. 15; 177-180, 449, 452-453, 458-459). On January 29, 1975, Arroyo was discharged (A. 14; 61-62).

As shown above (p. 6, *supra*), in December of 1974 Arroyo signed a membership card for Local 155 and distributed cards to fellow employees (A. 14; 86-87). As also shown, shortly after his recall on January 13, 1975, Arroyo openly resisted the demands of Orie, Rossi and Yagoda that he join Local 318 and yielded only after Rossi and Yagoda threatened to discharge him (A. 14; 88-90, 239-241). At the third meeting, Arroyo protested the coercive pressure to sign Local 318 cards (A. 14; 89-91). The following Monday, January 27, 1975, Arroyo was seen by Rossi talking with Quinonas, a know organizer for Local 155 (A. 14; 91-92, 221-223, 470, Tr. 712-713, 688-689). Arroyo worked that day and the next (A. 14; 61, 98), but when he arrived at work on Wednesday, January 29, 1975, he discovered that his time card was not in the rack (A. 14-15; 61, 92, 159-160, 212). Arroyo sought out Orie, his immediate supervisor, for an explanation; Orie stated that Rossi had said that Arroyo was fired (A. 14-15; 92, 159-160, 212). Orie explained further that Arroyo had been fired because an order had been packed incorrectly (A. 15; 93, 159-160, 178, 449). When Arroyo suggested that other employees might have been partly at fault for the error and that the matter required investigation,

Orie replied that he could do nothing to help Arroyo since the discharge had already occurred (A. 15; 93-94, 159-160, 212). Arroyo waited at the plant in the hope of speaking to Rossi or Minichino; he left after an hour or more since neither of them had arrived (A. 15; 92-93).

Two days later, Arroyo returned to the plant to pick up his pay check (A. 15; 99). Minichino gave him his check and Yagoda asked him if he was one of the organizers for Local 155 (A. 15; 100, 437, 422-423). Arroyo admitted his involvement with Local 155, and Yagoda stated that Local 318 was the only union in the shop and that no other union would get in (A. 15; 100). Arroyo then left (A. 15; 100).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that petitioners violated Section 8(a)(1) of the Act by: soliciting membership of their employees in Local 318 and, in order to induce employees to sign membership cards for Local 318, offering to pay that union's initiation fees and dues; coercively interrogating employees as to their interest in, or signing cards for, Local 155; warning employees against membership in Local 155 and stating that petitioners would not recognize or bargain with Local 155; and threatening employees with discharge if they refused to join Local 318 and with discharge or a plant shut-down if they became or remained members of Local 155 (A. 18-19, 23). The Board also concluded that petitioners violated Section 8(a)(3) and (1) by discharging employee Arroyo because of his activities in support of Local 155 and in opposition to Local 318 (A. 19, 23). The Board's order directs petitioners to cease and desist from the unfair labor practices found and from infringing in any

other manner upon the rights guaranteed to employees by Section 7 of the Act (A. 20, 23). Affirmatively, the order directs petitioners to offer to reinstate Arroyo, to make him whole for any loss of pay suffered from his discriminatory discharge, and to post appropriate notices (A. 20-21, 23).

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDINGS THAT PETITIONERS INTERFERED WITH, RESTRAINED AND COERCED THEIR EMPLOYEES, IN VIOLATION OF SECTION 8(a)(1) OF THE ACT.

Before the Board (A. 70-77), petitioners failed to take exceptions to the Administrative Law Judge's findings of Section 8(a)(1) violations. Under Section 10(e) of the Act,[5] that failure precludes review of the 8(a)(1) findings in this Court. See *Marshall Field & Co. v. N.L.R.B.*, 318 U.S. 253, 255-256 (1943); *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961); *KFC National Management Corp. v. N.L.R.B.*, 497 F.2d 298, 300, n. 1 (C.A. 2, 1974).

In any event, the facts amply support the findings that petitioners engaged in widespread coercive conduct in an effort to engender support for Local 318 and to blunt the organizing campaign of Local 155. As shown in the statement (*supra,* pp. 6-9), petitioners countered the December 1974 organizing efforts of Local 155 by conducting an intensive drive in January 1975 to obtain card signatures for Local 318. In the office of

[5] Section 10(e) provides that "[n]o objection that has not been urged before the Board . . . shall be considered by the Court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

Stoll's President Yagoda, petitioners questioned employees as to their union preferences and told them that, if they did not join Local 318, they would be discharged. At several plant meetings petitioners reiterated these warnings and threatened to close the shop if the employees chose Local 155. Petitioners also repeatedly told employees, individually and at meetings, that Stoll and Melange would pay Local 318's fees and dues. Accordingly, the Board properly found that petitioners unlawfully: (1) solicited card signatures for Local 318;[6] (2) attempted to induce membership in that union by offering to pay initiation fees and dues;[7] (3) coercively interrogated employees as to their choice of unions;[8] (4) warned employees against membership in Local 155 and stated that petitioners would not recognize it;[9] and (5) threatened employees with discharge if they refused to support Local 318 and with discharge or a plant shutdown if they became or remained members of Local 155.[10] In short, the Board's findings that petitioners committed "gross violations" (A. 16) of Section 8(a)(1) are valid and should be affirmed.

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[6] *N.L.R.B. v. Getlan Iron Works*, 377 F.2d 894 (C.A. 2, 1967).

[7] *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *N.L.R.B. v. Philamon Laboratories, Inc.*, 298 F.2d 176, 180-181 (C.A. 2, 1962), cert. denied, 370 U.S. 919.

[8] *N.L.R.B. v. Gladding Keystone Corp.*, 435 F.2d 129, 132-133 (C.A. 2, 1970).

[9] *N.L.R.B. v. Fitzgerald Mills Corp.*, 313 F.2d 260, 269 (C.A. 2, 1963), cert. denied, 375 U.S. 834.

[10] *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 617-619 (1969); *N.L.R.B. v. L.E. Farrell Company, Inc.*, 360 F.2d 205, 207 (C.A. 2, 1966).

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT PETITIONERS VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE NELSON ARROYO BECAUSE OF HIS SUPPORT FOR LOCAL 155 AND OPPOSITION TO LOCAL 318.

1. The issue before the Court is whether substantial evidence on the whole record supports the Board's finding that Arroyo's discharge was motivated by petitioners' opposition to his union activities. *N.L.R.B. v. Advanced Business Forms Corp.*, 474 F.2d 457, 464 (C.A. 2, 1973); *N.L.R.B. v. Dorn's Transportation Co.*, 405 F.2d 706, 712 (C.A. 2, 1969). "Rarely," however, ". . . does an employer admit that an employee has been discharged for participation in union activities." *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 204 (C.A. 10, 1967). Thus, in determining the motivation for a discharge the Board may rely upon circumstantial evidence as well as direct, and may draw reasonable inferences from all the surrounding circumstances. *N.L.R.B. v. Long Island Airport Limousine Service Corp.*, 468 F.2d 292, 295 (C.A. 2, 1972); *N.L.R.B. v. Dorn's Transportation Co., supra,* 405 F.2d at 713; *J. P. Stevens Co. v. N.L.R.B.*, 380 F.2d 292, 300-301 (C.A. 2, 1967), cert. denied, 389 U.S. 1005. Moreover, ascertainment of an employer's motivation is committed in the first instance to the Board, whose determination "cannot lightly be overturned." *United Aircraft Corp. v. N.L.R.B.*, 440 F.2d 85, 91-92 (C.A. 2, 1971); *N.L.R.B. v. Advanced Business Forms Corp., supra,* 474 F.2d at 464. A reviewing court "may not displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951); *N.L.R.B. v. Walton Mfg. Co.*, 369 U.S. 404, 405 (1962).

2. There is ample evidence supporting the Board's conclusion that petitioners discharged Arroyo because of his support for Local 155 and opposition to Local 318. As shown above, petitioners responded to Local 155's organizing campaign with massive violations of Section 8(a)(1), thus revealing a disposition to resort to unlawful means in order to thwart the efforts of Local 155's supporters. Petitioners' battery of threats, interrogations and promises of benefits indicates that its opposition to Local 155 never waned and that this hostility motivated Arroyo's discharge at the end of January 1975.

The record (*supra*, pp. 8-10) shows, contrary to petitioners' assertions (Br. 3-4), that Arroyo was an outspoken advocate of Local 155 and that his actions in support of that union and in opposition to Local 318 were particularly conspicuous during the two weeks immediately preceding his discharge. Indeed, there were at least three occasions during that period when petitioners were made aware of Arroyo's persistent support for Local 155. Thus, shortly after January 13, 1975 – when he returned to work following a layoff – Arroyo resisted the demands of Orie, Rossi and Yagoda that he sign a Local 318 card and gave in only after being threatened with discharge. At a subsequent plant meeting, on about January 24, 1975, Arroyo openly complained of this incident and criticized the illegality of petitioners' coercive methods. The next Monday morning, January 27, Rossi saw Arroyo conversing in front of the plant with a known Local 155 organizer. Arroyo was discharged two days later. Arroyo's discharge, then, occurred in the middle of the work week, two weeks after he had been threatened by petitioners with discharge for supporting Local 155, and within days after he had openly opposed Local 318 at a plant meeting and was seen by petitioners talking to an organizer

for Local 155. The "stunningly obvious" timing of the discharge underscores petitioners' discriminatory intent and therefore provides strong support for the Board's Section 8(a)(3) finding. *N.L.R.B. v. Rubin*, 424 F.2d 748, 750 (C.A. 2, 1970). See *N.L.R.B. v. Dorn's Transportation Co., supra*, 405 F.2d at 713; *N.L.R.B. v. Long Island Airport Limousine Service Corp., supra*, 468 F.2d at 296; *N.L.R.B. v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829; *N.L.R.B. v. Advanced Business Forms Corp., supra*, 474 F.2d at 465. The timing of the discharge is all the more "obvious" since Arroyo had been given a pay increase and added work responsibilities only two weeks earlier – a factor which suggests that, at the time of the discharge, petitioners believed Arroyo to be a competent and satisfactory employee.

As their "gross violations" (A. 16) of Section 8(a)(1) indicate, petitioners were determined to eliminate employee support for Local 155 by mounting a coercive attack on that union. Similarly, their threat to discharge Arroyo shows their determination to be rid of him if he remained a firm opponent to petitioners' favored union, Local 318. Indeed, the abrupt discharge of Arroyo on January 29 was simply a threat made good. Petitioners' real reason for firing Arroyo – their hostility to Local 155 – was explicitly confirmed when Yagoda, giving Arroyo his final paycheck (January 31), told him that Local 155 would never get into the plant.

Other factors give added support to the Board's finding of discriminatory intent. There was no credited proof that Arroyo had been formally reprimanded for absences or given a prior warning that he would be discharged if he failed to be at work every day.[11] Also significant is

[11] See *N.L.R.B. v. Ra-Rich Mfg. Co.*, 276 F.2d 451, 453 (C.A. 2, 1960).

petitioners' evasiveness in dealing with Arroyo at the time of the discharge.[12] The only "reason" offered to Arroyo at that time was an alleged packing mistake – a justification which petitioners subsequently abandoned. That mistake was not specifically identified and, despite Arroyo's protest, there was no further investigation of the matter. Neither Rossi nor Minichino told Arroyo that morning of the fact of his discharge or the reason for it; and Orie, when informing Arroyo of the discharge, avoided prolonged discussion by attributing the decision to Rossi, denying any power to reverse that decision, and telling Arroyo no more than that a packing mistake had been made. Petitioners' evasiveness in these dealings with Arroyo is highly probative evidence of an 8(a)(3) violation, particularly in light of other factors showing unlawful motivation.[13]

3. Petitioners' discriminatory motive is further illuminated by the shifting and implausible reasons which it advanced for Arroyo's discharge. See *N.L.R.B. v. United Mineral & Chemical Corp.*, 391 F.2d 829, 833 (C.A. 2, 1968). As noted, at the time of the discharge petitioners told Arroyo that he had been discharged for making a mistake in an order. In

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[12] *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 275, 278 (C.A. 5, 1962); *N.L.R.B. v. Melrose Processing Co.*, 351 F.2d 693, 699 (C.A. 8, 1965).

[13] Petitioners suggest (Br. 2-3) that the Board's finding of discriminatory motive is illogical since there was no evidence showing the discharge of other Local 155 supporters. It is well-settled, however, that the failure to discharge other union adherents does not disprove a discriminatory motive in an 8(a)(3) case (*Nachman Corp. v. N.L.R.B.*, 337 F.2d 421, 424 (C.A. 7, 1964); *N.L.R.B. v. Nabors*, 196 F.2d 272, 276 (C.A. 5, 1952), cert. denied, 344 U.S. 865) – especially where, as here, the discharged employee was a leading union spokesman and, indeed, was more defiant and outspoken than other employees in opposing company demands. See *N.L.R.B. v. United Mineral & Chemical Corp.*, 391 F.2d 829 (C.A. 2, 1968).

their answer to the complaint, petitioners contended that Arroyo was discharged at the end of January "for cause consisting of improper performance of duties and continual absence and lateness after warning" (A. 42). Well into the third day of the hearing, petitioners withdrew their defense of lateness, which they had been trying to establish (A. 112-113, 120, 125-127, 174-176, 46-62, Tr. 97), after Counsel for the General Counsel stated that he was prepared to issue a subpoena *duces tecum* to produce time cards for all of petitioners' employees in order to compare their timeliness with Arroyo's (S.A., pp. 1-2). Petitioners reaffirmed, however, that they were continuing to defend the discharge on grounds of improper performance of duties and continual absences after warning (S.A., pp. 1-2); and petitioners continued, as before (A. 318, 163-164, 169, 145-154, 234-235), their effort to support these contentions (A. 279, 328, 387-388, 399-400). Petitioners again changed their defense after Minichino testified that at the time Arroyo was fired "he was performing reasonably satisfactory" (A. 18; 401) and that a "single absence" had been the cause of the discharge (A. 16, 18; 423-428).[14]

Petitioners' final explanation at trial for the discharge – that it was caused by a single absence[15] – was discredited by the Administrative Law

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[14] In addition to the shifting and implausible reasons for the discharge, the Administrative Law Judge found numerous inconsistences and contradictions in the testimony of petitioners' witnesses relating to the discharge (*e.g.*, A. 15, n. 16, 16), a circumstance which tends to show that petitioners' defense was a fabrication. For example, while Minichino claimed that Arroyo had been fired for a "single absence", Orie testified that on the evening of the January discharge Minichino told him that Arroyo had been fired for making a "mistake" (A. 16; 354, 348).

[15] Petitioners attempt to stretch that here (Br. 14) into "two absences".

Judge (A. 18). Since ". . . questions of credibility are for the Trial Examiner and the Board," *N.L.R.B. v. L.E. Farrell Co., supra,* 360 F.2d at 207,[16] that finding should not be disturbed here. In any event, an analysis of the record shows that Minichino's testimony "has all the earmarks of a manufactured story" (A. 16). Arroyo testified that he did not work on Tuesday, January 21, because he had gone, with Minichino's advance permission, to Kennedy airport to pick up a relative (A. 14, n. 15; 454, 458-460). Though he had planned to be at work by noon, his car broke down as he left the airport and, at some time before noon, he called Minichino to explain that, under the circumstances, he would be unable to get to the plant that day (A. 14, n. 15; 454, 458-460). While giving this absence as the reason for the discharge, Minichino admitted that, when Arroyo called that day, he believed Arroyo's explanation and did not reprimand him or tell him he was discharged, but rather simply told Arroyo to talk to him the next day at work (A. 16; 443, 402-403, 406).

Minichino could not remember the date of the absence but concluded – after being reminded by counsel for petitioners that Tuesday, January 28, was Arroyo's last day of work – that the absence and telephone call had occurred on Wednesday, January 29 (A. 14, n. 15; 402-406, 420, 61). Minichino testified further that the next day he passed Arroyo at the plant without conversation even though Minichino had decided on the discharge and it was against his principles to discharge an employee without confronting him in person (A. 16; 402-403, 410, 421). Minichino also claimed that, after some days passed during which Arroyo was no longer working, he told Arroyo on the telephone that he was fired (A. 16; 421-423, 403, 432). Arroyo denied that this conversation took place and,

[16] Accord: *N.L.R.B. v. Milco, Inc.,* 388 F.2d 133, 136 (C.A. 2, 1968).

indeed, the credited facts suggest that he was never told in his dealings with petitioners after the discharge (see pp. 10-11, *supra*) that he had been fired because of an unauthorized absence (A. 16, 18; 197-199, 201, 159-160, 163-164, 460-461).[17]

It was well within the Board's province to reject Minichino's strained account of Arroyo's discharge, especially in light of the shifting and contradictory explanations offered by petitioners' witnesses. As the Board observed (A. 18): "The evidence, and the manner of its unfolding, suggests

[17] Petitioners contend (Br. 11) that the Board erred in concluding that Arroyo's trip to the airport occurred on Tuesday, January 21, rather than Wednesday, January 29. They also attempt to discredit Arroyo by pointing to his testimony that he was fired on Wednesday, January 22 (A. 96) — testimony which is contradicted by the time cards and was rejected by the Administrative Law Judge and counsel for both parties.

As the Board noted (A. 14, n. 15), however, Arroyo's confusion as to the date of his discharge was "innocent" since he had relied on a mistaken notation in Quinonas' diary that the discharge date was January 22 (A. 178-179, 96). As further noted (A. 14, n. 15), Arroyo testified (A. 461, 454) that his trip to the airport occurred on Tuesday, January 21, a date which is corroborated by petitioners' time cards (A. 60); thinking that the discharge date was January 22, Arroyo erroneously deduced that that his trip to the airport occurred the day before his discharge (A. 14; 96, 454, 461). The Board was "inclined to believe" that the airport trip occurred on Tuesday, January 21, (over a week before the discharge), especially in light of the time cards and Minichino's testimony that a number of days elapsed between the time of the airport trip and the announcement to Arroyo (allegedly by telephone) that he was fired (A. 14, n. 15, 16; 432, 420-424, 403). The Board also concluded, properly, that Minichino's "manufactured story" suggests that the airport trip "had been allowed by and was acceptable to Minichino when it occurred a week before discharge, and that it was dredged up as an alleged cause for discharge only after the necessity to find a cause arose later" (A. 16).

In any event, it would not appear to be material whether the airport trip occurred on January 21 or 29 since the whole record clearly shows that the real cause of Arroyo's discharge was his union activities. As the Board stated: if the trip "occurred on Wednesday, January 29, and Arroyo found his time card removed from the rack on Thursday morning, January 30, the result in the case is the same" (A. 14, n. 15).

that Office Manager Minichino, as the loyal subordinate of top management Production Supervisor Rossi and President Yagoda, was simply attempting to provide and shoulder for his superiors an excuse to cover their real reason to be rid of employee Arroyo."[18] Finally, even if some

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18 Petitioners tried to show at trial that Arroyo was actually fired twice, first at the end of December for packing mistakes, and that he was then rehired out of sympathy. They contend here (Br. 11) that the Board erred in concluding (A. 15) that the "alleged first firing . . . turned out to be a temporary layoff" because of a seasonal slowdown in business.

The Administrative Law Judge, however, credited the testimony of Arroyo and Vargas that they were temporarily laid off in December and told to call in daily for work (A. 15; 449-453, 102, 120, 135-136, 145-146, 244). Moreover, petitioners' contention that Orie fired Arroyo in December "is not credible particularly since Orie admitted that he approved the January pay raise granted by Minichino" (A. 15; 380-381, 409). Petitioners' contention (Br. vii, 11, 13) that Arroyo was given the raise because he was reassigned to work solely to do "returns" was rejected by the Administrative Law Judge, who credited testimony of Arroyo and Vargas that Arroyo worked on both "returns" and packing after he returned to work in January (A. 15; 103, 178, 449, 452-453). This testimony was corroborated by the fact that Orie "unwittingly tripped himself up by . . . asserting that Arroyo continually made mistakes, in packing, in January" (A. 15, n. 16; 339-340, 361-363, 355-356, 369).

Noting first that Arroyo and the entire shipping department were reproached prior to Christmas 1974 for making errors (Br. vi, see A. 101-102), petitioners try to undermine the Board's findings by asserting that Arroyo acknowledged his discharge in December (Br. viii, x) and that Vargas testified to being aware at that time of petitioners' dissatisfaction with Arroyo for errors (Br. vi, viii). The portions of the record on which petitioners rely, however, relate to the discharge at the end of January (A. 201, 248-249). Indeed, the testimony of Vargas to which petitioners refer supports the Board's findings because it indicates that, after the January discharge, the story circulating in the plant was that the cause of Arroyo's discharge was a packing error and not an unauthorized absence (see A. 248-250, 98-99, 159-160). Petitioners similarly rely (Br. viii) on the testimony of their witness Heerapersaud (A. 386) that in December he overheard Orie firing Arroyo for mistakes (A. 391). Heerapersaud, however, subsequently retreated from this position (A. 391-392) and, on cross-examination, stated that he could remember hearing Orie say only that Arroyo made mistakes (A. 394).

In short, petitioners' examples of alleged inaccuracies in the opinion below do not demonstrate a lack of substantial support in the record for the Board's 8(a)(3) finding.

dissatisfaction with Arroyo's work performance figured in petitioners' determination to fire him, his discharge would nonetheless be unlawful. For ". . . the existence of a lawful cause for discharge does not insulate an employer from a determination that it violated Section 8(a)(3) if the Board makes a finding supported by substantial evidence that the discharge was at least partly for union activities." *N.L.R.B. v. Gladding Keystone Corp., supra,* 435 F.2d at 131-132. See also *N.L.R.B. v. Dorn's Transportation Co., supra,* 405 F.2d at 713.

Thus, petitioners' defenses were clearly inadequate. The Board could properly reject them and conclude, on the record as a whole, that the real reason for Arroyo's discharge was his union activities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's order should be enforced in full.

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July 1976.

(P.M. Session started at 1:45 P.M.)

JUDGE PLAINE: Let's go on the record.

In an off-the-record discussion before we began this afternoon's session, it was indicated that counsel for the General Counsel was requesting, by subpoena duces tecum, the cards of various other employees of the Stoll and Melange Companies.

Apparently the request was addressed to ascertaining the comparative record of latenesses by these other employees in relationship to employee Arroyo.

Is that correct?

MR. BLYER: Yes.

MR. PULVERMACHER: Yes.

JUDGE PLAINE: Counsel for the Respondent —

MR. PULVERMACHER: Melange.

JUDGE PLAINE: — Melange — off the record.

(Discussion off the record.)

JUDGE PLAINE: Back on the record.

— counsel for the Respondents — and you are that?

MR. PULVERMACHER: That I am.

JUDGE PLAINE: All right.

— counsel for the Respondents apparently is willing to stipulate that his answer in regard to the discharge of Arroyo should be modified to withdraw the claim that employee Arroyo was discharged for continually lateness after warning.

Is that correct?

MR. PULVERMACHER: That is the position correctly expressed of counsel for the Respondents.

JUDGE PLAINE: So that motion of the answer — and it appears in the affirmative defense answer — is withdrawn.

Is that correct?

MR. PULVERMACHER: May I have a moment, your Honor?

JUDGE PLAINE: Yes.

MR. PULVERMACHER: I was really withdrawing the words, "And lateness," so that the allegation in Paragraph eight will read, your Honor:

"Said employee was discharged for cause, consisting of improper performance of duties and continual absence after warning."

* * * * *

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

STOLL INDUSTRIES, INC., and MELANGE SPORTSWEAR, INC., Petitioners,	)	
v.	)	No. 76-4077
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

Att: Louis C. Pulvermacher, Esq.
410 Park Avenue
New York, New York 10022

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 12th day of July, 1976.